RE KIAN JOO HOLDINGS SDN BHD;
ABDUL JABBAR ABDUL MAJID & ANOR (APPLICANTS)

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[ORIGINATING SUMMONS NO: D1-24-361-1996]
2 JUNE 1999

COMPANY LAW: *Winding-up - Liquidator - Liquidator's power to sell company's assets - Differences amongst contributories in diposal of assets - Whether permitted to sell or requires court's direction and approval - Companies Act 1965, ss. 236(2)(c), 237(3) - Discretion of liquidator in management of company's assets - Court's approval required only if difficulty arose in administration of winding-up - Right of appeal by contributories against actual or envisaged exercise of liquidator's powers - Companies Act 1965, s. 279*

This was an application by the liquidators of Kian Joo Holdings Sdn Bhd (in liquidation) ('the company') seeking for court's direction and approval for the sale of the assets of the company, under s. 237(3) of the Companies Act 1965 ('the Act'), presently in the liquidators' possession in such manner and on such terms as the liquidators deem to be in the interest of the company. The application was made because the contributories of the company were not unanimous in their preference as to the manner in which the assets of the company were to be dealt with. The main issue for the court's determination was whether the liquidators' application fell within the scope of s. 237(3) of the Act.

Held:

[1] The law as provided for in s. 236(2)(c) of the Act clearly permitted the liquidators the sale. Further, an application for directions under s. 237(3) of the Act would entail a consideration of the details of how a particular matter arising under the winding-up was to be treated, implemented or carried out. In this case, the liquidators were not asking for any directions on the details of the sale. Just because there was a difference in view amongst the contributories, the liquidators should not be divested of the responsibility of making a decision.

[2] Accordingly, s. 237(3) of the Act should only be resorted to by the liquidators if a difficulty arose in the course of their administration of the winding-up, in which event they would be obliged to inform the court and take directions, and not otherwise.

[3] Sections 236(2)(c), 236(3), 237(3) and 237(4) of the Act when read together show that a creditor or contributory of a company may apply to the court in respect of the actual or envisaged exercise of the liquidator's powers under s. 236, whereas a liquidator is confined to applying for the directions of the court only in relation to any particular matter under the winding-up. He is otherwise required to use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[4] The court should exercise its powers under s. 237(3) of the Act sparingly in view of the possibility of an appeal being made to it under s. 279 against any act or decision of the liquidator. If the court were to give a blanket approval to any sale of the assets of a company presently in the liquidator's possession, in such manner and on such terms as the liquidator's deems to be in the interest of the company, the court would be effectively emasculating itself by transferring to the liquidator its powers under s. 237(3) of the Act to give directions in relation to any particular matter arising under the winding-up. The same would apply in respect of its powers under s. 236(3) and s. 279 of the Act in that it would be pre-empting any challenge being mounted by any creditor or contributory of the company questioning the exercise of the liquidator's powers under s. 236(1) and s. 236(2), or by any aggrieved person against any act or decision of the liquidator requiring curial intervention and determination.

[5] By seeking the approval of the court, the liquidators were in essence seeking protection from any challenge by the petitioning contributories against their decision to sell the assets. The court should not pre-empt the contributories from doing so as that was their right as enshrined in s. 279 of the Act.

[Application dismissed with costs.]

Case(s) referred to:
Duffy v. Super Centre Development Corp Ltd [1967] 1 NSWLR 382 ***(refd)***
Re Mineral Securities Australia Ltd [1971-1976] 1 ACLC 40-076 ***(refd)***
Sanderson v. Classic Car Insurances Pty Ltd (1985) 10 ACLR 115 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 236(1), (2)(c), (3), 237(2), (3), (4), 279

Companies Act [Aust], ss. 236(3), 279

Other source(s) referred to:
The Law of Company Liquidation, J O' Donovan, 1987, 3rd edn, pp 251, 252

For the applicants - DP Naban (Shirlena Yogeswaran & Karen Wilfred with him); M/s Lee Hishamuddin
For the petitioning contributories - Izabella de Silva; M/s Iza Ng Yeoh & Kit
For the respondent contributories - VK Lingam (Peter Raj with him); M/s PI Raj & Co

Reported by Farah Naim

JUDGMENT

T Selventhiranathan J:

Enclosure (1) was an application by the liquidators of Kian Joo Holdings Sdn Bhd (in liquidation) ("the company") seeking the approval of the court for the sale of the assets of the company, under s. 237(3) of the Companies Act 1965 ("the Act"), "presently in the liquidators' possession or which come into the liquidators' possession in such manner and on such terms as the liquidators deem to be in the interests of the company as a whole".

(Any reference hereinafter to a section by itself shall mean that section as it appears in the Act, unless the context shows otherwise).

The liquidators were appointed under an order of court winding up the company on 30 January 1996 pursuant to a petition presented by eleven of the contributories and shareholders of the company ("the See Teow Guan group of petitioning contributories", also "the petitioning contributories"). The total authorised share capital of the company is 5,000,000 ordinary shares of RM1 each, of which 4,732,805 have been issued and fully paid up.

The assets of the company include 40,941,276 fully paid-up ordinary shares of RM0.50 each and 5,698,835 warrants in Kian Joo Can Factory Bhd ("KJCFB"), a publicly listed company on the main board of the Kuala Lumpur Stock Exchange ("KLSE'), which shares and warrants were in the possession of the liquidators, and a further 1,800,000 fully paid-up shares of RM0.50 each in KJCFB deposited with the Hong Kong and Shanghai Banking Corporation Limited, Singapore ("the shares and warrants" or, collectively, "the assets"). Further KJCFB held 54.85% of the issued ordinary share capital, constituting a controlling interest, in Box Pak (Malaysia) Bhd, a company also listed on the KLSE (para. 4 of encl. (2)).

Prior to the winding up of the company, prayer 4(a) of the petition seeking a distribution in specie of the shares and warrants to the contributories of the company was struck out by the court on the application of the respondents in the petition ("the See Teow Chuan group of respondent contributories", also "the respondent contributories"). Against this order, the petitioners had filed an appeal to the Court of Appeal. However, an application for the stay of the winding up of the company pending appeal was dismissed by that court.

Pursuant to s. 237(2), the liquidators convened a meeting of the contributories of the company on 12 July 1996 to ascertain their wishes regarding the disposal of the assets in the liquidators' possession. All the contributories were present, either in person or by proxy. At this meeting, 52% in number and 55% in value of the contributories voted in favour of a sale of the shares and warrants as opposed to a distribution in specie of the same (para. 5 of encl. (2)).

As the contributories were not unanimous in their preference as to the manner in which the assets of the company were to be dealt with, the liquidators by this application sought the approval of the court to sell the assets in such manner and on such terms as the liquidators deem to be in the interest of the company as a whole.

To support his contention that the court should give directions as regards the sale of the assets, counsel for the liquidators referred to *The Law of Company Liquidation* by BH McPherson (3rd edn, 1987 by J O'Donovan), wherein it is stated at pp. 251 and 252 with regard to the Australian equivalent of s. 237(3) of the Act as follows:

> In compulsory winding up the procedure for obtaining the advice of the court is for the liquidator to apply by summons under section 379(3) or the inherent jurisdiction for directions in relation to particular matters arising in the winding up. This course is so frequently taken that little purpose would be served by attempting a catalogue of all the situations in which such an application may be made. A few examples which may be mentioned are where the liquidator wishes to know whether to postpone the sale of certain assets, to institute proceedings for misfeasance, to admit a particular debt or claim to proof in the winding up, to make payments out of the assets, or to levy calls on contributories. Although a direction given on such an application does not amount to a judicial determination raising an estoppel, the advantage of using this procedure is that, having obtained and followed the advice of the court with respect to a particular matter, the liquidator is then protected against any possible allegations of breach of duty which might subsequently be made against him by creditors or contributories of the company.

Counsel for the See Teow Guan group of petitioning contributories, on the other hand, submitted that the liquidators' application should be dismissed as it did not fall within the scope of s. 237(3). This was because s. 236(2)(c) specifically provides that the liquidators have the power to sell immovable and movable property and things in action of the company by public auction, private tender, or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels without any need of authorisation from the court or committee of inspection.

Counsel for the See Teow Chuan group of respondent contributories took a different stand and submitted that the court should not grant a blanket approval for the sale of the assets but should instead make specific orders as follows:

(i) that the liquidators carry out the necessary preliminary and ancillary steps for the sale of the assets by public tender;

(ii) that the sale of the assets be advertised in local newspapers;

(iii) that the liquidators submit and report to the court on the progress of the sale.

Having considered the submissions and authorities cited by learned counsel, I was of the view that this application by the liquidators was not appropriate under s. 237(3) which provides as follows:

> The liquidator may apply to the court for directions in relation to any particular matter arising under the winding up.

Enclosure (1), although couched to be an application pursuant to s. 237(3), was in fact not an application for directions under that provision but was instead an application for the court to exercise the discretion which ought to be exercised by the liquidators. This is clearly evident from the submission in reply by counsel for the liquidators that the principal issue for the court to determine was as to whether the liquidators ought to be permitted the sale of the assets of the company as opposed to retaining the same so as to enable their distribution in specie, even though prayer (1) of encl. (1) sought the approval of the court for the intended sale[s] of the assets of the company in a manner and upon terms which the liquidators deemed to be in the interests of the company as a whole.

With respect, the issue whether the liquidators ought to be permitted the sale or not did not arise in the circumstances obtaining because the law as provided for in s. 236(2)(c) clearly permitted the liquidators the sale.

Further, an application for directions under s. 237(3) would entail consideration of the details of how a **particular matter arising under the winding up** was to be treated, implemented or carried out (emphasised). In this case the liquidators were not asking for any directions on the details of the sale. As counsel rightly submitted, the terms of a sale of the assets of the company would be a commercial decision best left in the hands of the liquidators as the legislature intended it to be. Just because there was a difference of views amongst the contributories, the liquidators should not be divested of the responsibility of making a decision.

Further down in the very passage cited by counsel for the liquidators (reproduced earlier) from *The Law of Company Liquidation (supra)*, the following statement appears at p. 252:

> The liquidator should not seek directions on matters which fall within his discretion in order to absolve himself of responsibility for making a difficult commercial decision. By the same token, if a difficulty arises in the course of his administration he is obliged to inform the court and take directions.

Accordingly, it is my view that s. 237(3) should only be resorted to by the liquidators if a difficulty arises in the course of their administration of the winding up, in which event they are obliged to inform the court and take directions, and not otherwise. In the present case, no evidence was forthcoming of any difficulty having arisen in relation to **any particular matter** in the winding up as stipulated in s. 237(3) (emphasis added).

I find further authority for this interpretation of s. 237(3) in the language of s. 237(4) which is in the following explicit terms:

> Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

In addition thereto, s. 236(2)(c) empowers the liquidator to "sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels". The exercise of this and other powers by the liquidator is subject to the control of the court pursuant to s. 236(3), which section also enables any creditor or contributory to apply to the court with respect to any exercise or proposed exercise of any of those powers. Section 279 enables any person aggrieved by any act or decision of the liquidator to apply to the court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

These provisions, *ie*, ss. 236(2)(c), 236(3), 237(3) and 237(4), read together show that a creditor or contributory of a company may apply to the court in respect of the actual or envisaged exercise of the liquidator's powers under s. 236 whereas a liquidator is confined to applying for the directions of the court only in relation to any particular matter under the winding up. He is otherwise required to use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

The court should exercise its powers under s. 237(3) sparingly in view of the possibility of an appeal being made to it under s. 279 against any act or decision of the liquidator. If the court were to give a blanket approval for "any sale[s] of the assets of (the company) presently in the liquidators' possession, or which come into the liquidators' possession, in such manner and or such terms as the liquidators deem to be in the interests of the company" as applied for in prayer (1) of encl. (1), the court would be effectively emasculating itself by transferring to the liquidators its power under s. 237(3) to give directions in relation to any particular matter arising under the winding up. The same would apply in respect of its powers under ss. 236(3) and 279 in that it would be pre-empting any challenge being mounted by any creditor or contributory of the company questioning the exercise of the liquidators' powers under ss. 236(1) and 236(2), or by any aggrieved person against any act or decision of the liquidators requiring curial intervention and determination. The order sought under prayer (1) of encl. (1) would have far-reaching consequences in that it would arguably even excuse any negligent acts of the liquidators in the sale of the assets of the company. The law would indeed be an ass if this were allowed to happen.

In *Re Mineral Securities Australia Ltd* [1971-1976] 1 ACLC 40-076 Street CJ of the New South Wales Supreme Court, sitting in the Equity Division, had occasion to consider provisions of the Australian Companies Act in *pari materia* with ss. 236(3) and 279 of the Act (and which bear the same section numbers) in relation to the exercise of the power of sale of the assets of a company by its liquidator. That case involved a challenge to the actual exercise of the power of sale of the assets in question by the liquidator. However, in the course of a very lengthy judgment, Street CJ had this to say at pp. 40-076(17) to 40-076(18) of the report of that case:

> **(17) Principles governing review by the court of the exercise by the liquidator of his powers**
>
> The principles which must guide the court in determining whether or not the manner of exercise of this power of sale renders the agreement invalid have developed around the court's supervisory control over liquidators. The relevant statutory provisions are contained in sections 236(3) and 279, namely:

> 236(3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the court and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.
>
> 279 Any person aggrieved by any act or decision of the liquidator may apply to the court which may confirm reverse or modify the act or decision complained of and make such order as it thinks just.

In *Leon v. York-o-matic Ltd and Others* ([1966] 3 All ER 277) Plowman J was asked to intervene in respect of a contract of sale entered into by a liquidator in a winding up by the court on the ground of insolvency. At p. 280 he drew, for guidance as to the approach to be adopted, upon the principles applicable under the bankruptcy legislation where a challenge is brought against the exercise by a trustee of his powers. He held that those principles are by way of analogy applicable in a challenge to a liquidator's actions. In this regard he quoted a statement by Jessel MR:

> Here the appellant says that the refusal to sell is an absurd exercise of the discretion of the trustee. But the court will not interfere unless the trustee is doing that which is so utterly unreasonable and absurd that no reasonable man would so act.

Plowman J summarised his findings:

> Here, as I have said, there is no question of fraud and, having considered all the evidence, which is fairly voluminous and lengthy, I am not satisfied that the liquidator did not exercise his discretion *bona fide*; nor am I satisfied that he acted in a way in which no reasonable liquidator could have acted.

In *Re Teller Home Furnishings Pty Limited* ([1967] VA 313) Gowans J referred to *Leon v. York-o-matic Limited,* and accepted that the passage I have quoted from the judgment of Plowman J correctly stated the approach to be adopted by the court under provisions such as s. 279.

The approach indicated in the two cases I have just mentioned places a heavy burden upon the shoulders of an applicant. I would have some reservations as to the universality of a test expressed in these terms, particularly in circumstances such as those with which the court was concerned in *Hall v. Forrest* ([1972] 2 NSWLR 961) (see *CCH Corporate Affairs Reporter* - 40-063). It is, of course, clear enough that the court does not simply sit on appeal from decisions of a liquidator. A party challenging a decision may well bear an onus varying in inverse proportion to the importance of the decision sought to be called in question. But whether the decision be important, or trifling, the course of the winding up machinery imposes upon the liquidator the responsibility for making it, and he is recognised as having both the qualifications and the access to the multiplicity of information which may be

necessary in order to make the commercial decisions in the winding up. I note the slight divergence between Jessel MR's words that the court will not interfere unless the trustee acts in a manner in which 'no reasonable man **would** so act' and Plowman J's words that he was not satisfied that the liquidator had acted in a way in which 'no reasonable liquidator **could** have acted'. At the risk of descending to semantics, my own inclination would be to prefer the word 'should' to either 'would' or 'could' in those phrases.

Ultimately every challenge must probably come back to some more broadly-stated question, such as whether the liquidator's action has such importance and can be seen to have such defects as to justify the court exercising its supervisory power.

I venture to state my understanding of the court's task in terms that I used some years ago when considering the court's inherent power to review a decision of a court-appointed receiver and manager (*Duffy v. Super Centre Development Corporation Ltd* [1967] 1 NSWR 382 at 383):

> The receiver and manager is appointed as an officer of the court to undertake in that capacity the management of the business of the company as well, of course, as undertaking the care of the company's assets. To the extent to which he makes decisions from time to time, they are in effect made under the authority of the court itself, and they are subject to review and control by the court should a proper case be made out requiring such intervention. Whilst this court does, therefore, have an ultimate control over the day-to-day actions of a receiver and manager, it is a control which is not in my view to be too freely exercised. If, of course, there can be shown to be some defect in the manner in which the receiver and manager is conducting his duties – a defect arising either out of some want of good faith or out of some erroneous approach in law or in principle – then that is clearly a ground on which the court would entertain an application by one of the interested parties for appropriate directions or some other form of remedial order. Where, however, the challenge made is that there has been an absence of prudence and wisdom in the receiver's decisions, a far heavier onus rests upon the party who seeks to challenge the decision in question. The court will not concern itself with minor and ordinary decisions that he may have made: it must be shown that there is a decision of real significance in the affairs of the company and as to which there are real and substantial grounds for questioning its correctness before the court will embark upon an investigation of what, if any, directions ought to be given.

I should observe that these comments were made in the context of an application (unsuccessful as it turned out) for administrative directions affecting the manner in which the receiver and manager was conducting the business of the company. The concluding portion indicates the court's reluctance even to entertain a challenge to a decision on the grounds of absence of prudence and wisdom.

(18) Weight attaching to wishes of creditors

When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyer's disclaimer of expert qualifications in the matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision. Recognising this, the Legislature has, in section of the Companies Act dealing with windings up, enacted in s. 289 that:

> 289(1) The court may as to all matters relating to the winding up of a company have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence ...
>
> (2) In the case of creditors regard shall be had to the value of each creditor's debt.

It can therefore be seen that even in the case of *Duffy v. Super Centre Development Corporation Ltd (supra)* referred to in the above judgment, the application for administrative directions was made in relation to the manner in which the receiver and manager was conducting the business of the company. However, the application was unsuccessful as the applicant was unable to show "some defect in the manner in which the receiver and manager was conducting his duties – a defect arising either out of some want of good faith or out of some erroneous approach in law or in principle".

Similarly, in the present case, the liquidators had to present evidence to invoke the operation of s. 237(3), and for this purpose they would first have to exercise their discretion and act under s. 237(4) in relation to the management of the affairs and property of the company and the distribution of its assets, and only if they encountered any difficulty in relation to **any particular matter arising** under the winding up could they then proceed to make an application under s. 237(3).

The Supreme Court of New South Wales considered this issue in *Sanderson v. Classic Car Insurances Pty Ltd* [1985] 10 ACLR 115. With respect, I adopt as correct the statement by Young J at pp. 116 to 117 of the report of that case as follows:

> Although section 379(3) of the Companies Code is expressed in wide terms, it seems to me clear that it does not permit the liquidators or a provisional liquidator to come to the court whenever he feels some unease about a situation and wishes to obtain some sort of insurance against the possibility of error, as well as assurance that he is on the right track. A liquidator is an officer of the court, and the modern liquidator today performs many of the functions which in former ages were dealt with by a judge, master or registrar, at least

in the first instance. In addition, the persons eligible to be registered as liquidators and to be appointed liquidators only are so eligible because they possess not only the appropriate qualifications in accountancy, but also are experienced in the world of commerce. The Companies Code and the orders of the court these days usually commit the entire conduct of the liquidation to the liquidator, and empower him to do what in his commercial judgment he thinks best in the interests of the creditors as a whole, leaving persons aggrieved to their remedy by appeal to the court, and also leaving the liquidator free where he can forsee a challenge to the powers, or where there is some extremely difficult problem, to apply to the court whose officer he is for directions.

...

However, it is also true to say that virtually all the cases on s. 399(3) or its predecessors involve one of the following four classes of cases:

(a) a guidance to the liquidator on matters of law: see eg *Re Australian Home Finance Pty Ltd* [1956] VR 1 and *Re Standard Insurance Co Ltd* [1963] 80 WN (NSW) 1355;

(b) questions involving legal procedure (eg whether a liquidator should settle curial proceedings, and if so, on what terms);

(c) whether a liquidator should act on his commercial judgment to postpone a sale because he recognizes his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible and to distribute (an example is *Re Statewide Investments Ltd (In liq)* [1981] 6 ACLR 265); or

(d) where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has acted *male fide* or in an absurd or unreasonable or illegal way: see *Re Bayswood Pty Ltd* [1981] 6 ACLR 107 at 113.

Essentially, then, though there is wide jurisdiction given to the court under s. 379(3) of the Code, it is usually only proper to exercise that power where the matter involves guidance to the liquidator on matters of law or principle or to protect him against accusations of acting unreasonably. The court does not usually consider it proper to intervene and make the liquidator's commercial decision for him. Indeed the court is always reluctant to credit itself with any degree of competence in this field at all. Indeed the present Chief Justice said in *Re Mineral Securities (supra)* at p. 232:

> When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyers' disclaimer of expert qualifications in matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision.

> Again, in a different context, Lindley LJ said in *Re English Scottish & Australian Chartered Bank* [1893] 3 Ch 385 at 409, that creditors acting on sufficient information with sufficient time to consider what they are about are much better judges of what is to their commercial advantage than a court can be. This passage has been cited many times since, concluding by Bowen CJ in Eq in the *Codisco* case at 27909.

I am further of the view that by seeking the approval of the court, the liquidators are in essence seeking protection from any challenge by the petitioning contributories against their decision to sell the assets. The court should not pre-empt the contributories from doing so as that is their right which is enshrined in s. 279.

For all the reasons set out above, encl. (1) was dismissed with costs.